BR-114109-A

A majority of the Board held that where a claimant quits in anticipation of discharge, we consider whether her separation was caused by deliberate misconduct. Based upon her guilty plea to criminal theft charges, we conclude that her separation was disqualifying.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Board of Review Letterhead

Introduction and Procedural History of this Appeal

The employer appeals a decision a review examiner of the Division of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was suspended from her position with the employer on January 12, 2010. She filed a claim for unemployment benefits with the DUA, which was allowed in a determination issued on February 11, 2010. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on April 30, 2010. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was suspended for an indefinite period of time and, thus, was not disqualified, under G.L. c. 151A, § 25(f). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence relating to pending criminal charges and the claimant's employment status. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, a postal worker, who was suspended and ultimately resigned because she used her position with the employer to steal mail, should be viewed as having been discharged *ab initio* as a matter of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant has worked for the instant employer as a part-time letter carrier from 9/1/2005 until 1/12/2010 when she was suspended by the employer.

2. On 1/12/2010, the employer's Office of Inspector General informed the claimant that she was removed from service indefinitely until an investigation is completed by the Office of Inspector General.

3. The claimant was not provided a date when she would be able to return to work or if she was going to be able to return to work.

4. The claimant was suspended for theft of mail which is a violation of the employer's company policies.

5. Subsequently, the claimant was [indicted] on 7 federal charges stemming from her violation of the employer's policy.

6. The employer will determine the claimant's future employment status after the conclusion of such federal charges.

7. Subsequently, the claimant resigned her employment on 6/21/2010 [sic] based on advice from the Union President. The claimant does not know why she was instructed to resign.

8. The employer did not terminate the claimant's employment.

9. On 4/14/2011, the claimant entered into an agreement with the US Department of Justice to cooperate as a witness in the future in return for reduced sentencing.

10. A few weeks prior to the Remand Hearing, the claimant pled guilty to the 7 federal charges however she does not recall what charges she pled guilty to. The claimant has not been sentenced.

11. At the Remand Hearing, the employer did not produce an investigation report or any documentation as specifically requested in the Remand Order.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact[1]. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner awarded benefits under G.L. c. 151A, § 25(f), which provides, in relevant part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter...(f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation; 430 CMR 4.04(4) provides, in pertinent part, as follows:

> A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, and that a claimant has the right to return to his employment with the employing unit if work is available at the end of the period of suspension.

The review examiner concluded that because the claimant's suspension was for an indefinite period, she was eligible for unemployment benefits during the period of her suspension, under G.L. c. 151A, § 25(f). We disagree.

In BR-110769 (Jan. 11, 2011), we drew a distinction between suspensions imposed while investigations of suspected wrongdoing are pending and suspensions meted out as punishment for established disciplinary infractions. The findings provide that the claimant was suspended on January 12, 2010, pending the outcome of an investigation. Since the employer had not yet reached a conclusion about whether the claimant engaged in wrongdoing, this was not a suspension meted out as discipline for violating established rules of employment, within the meaning of G.L. c. 151A, § 25(f).

In our view, the claimant was separated from employment from the date of her suspension in the sense that she was willing and able to work, but her employer would not let her do so. *See* Dir. of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (held forced leave of absence to be a separation where the claimant wanted to work and was able to do so but employer would not let her). Where a claimant is suspended while an employer investigates whether or not the claimant engaged in the alleged wrongdoing, we treat the suspension as the Court treated the leave in Fitzgerald, and consider whether the claimant was out of work through no fault of her own. In the present appeal, the claimant never returned to work. She resigned on May 21, 2010[2].

First, we examine whether the claimant voluntarily left her employment on May 21, 2010. G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for...the period of unemployment next ensuing...after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent...

The review examiner found that the claimant did not know why the Union President advised her to resign. However, it is apparent from the circumstances that the claimant resigned in anticipation of being terminated for her criminal activity. When she tendered her letter of resignation, the claimant had already entered into an agreement with the Department of Justice to plead guilty to pending criminal charges, and she had received the employer's letter of proposed removal[3].

The Supreme Judicial Court has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of the Division of Employment Security, 391 Mass. 399, 401-402 (1984), citing White v. Dir. of the Division of Employment Security, 382 Mass. 596, 597-598 (1981). Thus, under Malone-Campagna, we treat the claimant's resignation as an involuntary termination.

Involuntary terminations are analyzed under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for...the period of unemployment next ensuing...after the individual has left work...(2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest...

The claimant admitted that she stole mail from the employer. In fact, she pled guilty to federal criminal charges in connection with the theft. This is more than sufficient proof to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Next, we consider whether the claimant was out of work during her suspension for disqualifying reasons. Since the claimant's suspension was imposed for the same activity that caused the claimant to plead guilty to criminal charges and to terminate her employment, we treat the period of suspension no differently. Consequently, we find that her initial suspension was imposed for disqualifying reasons.

We, therefore, conclude as a matter of law that the claimant was not entitled to any benefits, under G.L. c. 151A, § 25(e)(2), either during her investigatory suspension or after her permanent separation.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 23, 2010 and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF MAILING - June 2, 2011

/s/

John A. King, Esq.
Chairman

/s/

Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – July 5, 2011
AB/rh

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[1] We do so with the exception of Consolidated Finding of Fact #6, which provides that the employer will postpone its decision about the claimant's employment status until a future date. It is apparent from Consolidated Finding #7 that at the time of the remand hearing, the claimant had already ended her employment.

[2] At the remand hearing, the employer offered unrefuted testimony that the claimant submitted her resignation letter on May 21, 2010, not June 21, 2010, as written in Consolidated Finding #7. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[3] Testimony at the hearing about the employer issuing the claimant a proposed letter of removal on May 15, 2010, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Id.